Majlis Perbandaran Pulau Pinang v Lembaga Rayuan Negeri Pulau Pinang & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING MOTION NO 25–116 OF 1997
KAMALANATHAN RATNAM J
14 AUGUST 2002

Administrative Law *— Exercise of administrative powers — Local authority — Planning permission for development — Appeal against directive of applicant — Whether applicant had powers to issue directive and whether appealable — Whether direction was ultra vires — Town and Country Planning Act 1976 ss 21, 23*

The applicant was a local authority incorporated pursuant to the Local Government Act 1976 and was the local authority for Penang island. The applicant was also the local planning authority for Penang island pursuant to the Town and Country Planning Act 1976 ('the TCPA'). The first respondent was constituted under s 36 of the TCPA to hear appeals pursuant to s 23 of the TCPA against decisions of the Local Planning Authority made under s 22(3) of the TCPA. The second respondent was a developer. The second respondent made an application for planning permission for development. The applicant had made a certain directive ('the said directive') and directed that the second respondent amend its plan accordingly in order to comply with the said directive of the applicant and to re-submit the application for its consideration. However, the second respondent filed a notice of appeal against the said directive of the applicant under s 23 of the TCPA. The first respondent heard the said appeal. The applicant raised a preliminary objection at the hearing to the effect that the said directive was not an appealable matter under s 23 of the TCPA. After hearing the appeal on the merits, the first respondent allowed the second respondent's appeal and held that the applicant had no powers to issue the said directive. Dissatisfied with the decision of the first respondent, the applicant sought judicial review by way of certiorari to quash the decision of the first respondent.

Held, dismissing the application:

(1) The decision referred to in s 23 of the TCPA must of necessity be taken to include any direction or ruling made by the applicant in relation to any matter that concerned the application for planning permission made pursuant to s 21(1) of the TCPA. The words 'written directions' in s 21(3) of the TCPA must by reason of legislative framework considerations be taken also to mean a decision of the local planning authority as provided under s 23(1) of the TCPA. A written direction was also a decision (see p 56E–G).

(2) The problem in this case was one of *casus omissus*, ie that a matter which should have been, but has not been provided for in a statute, rather than one of being precise and unambiguous. The TCPA was both a consolidating as well as a comprehensive Act in respect of planning law in this country. The fact that s 36 of the TCPA provided for the establishment of an appeal board was sufficient to suggest that aggrieved parties involved in the process of planning should be given the right of an appeal. If the literal approach was to be adopted then quite clearly it could result in an oppressive and capricious situation where a local planning authority for any one of several reasons could impose intolerable and improper written directions and an aggrieved applicant would not have any recourse to a remedy or an appeal (see p 57E–G).

(3) The applicant had failed to recognize that s 22(2) of the TCPA was only applicable for the purposes of granting either absolutely or subject to conditions, or for refusal to grant planning permission. It was implicit that for the purposes of s 21(3) of the TCPA, there was no such requirement to take into account the provisions of the structure plan and therefore for that limited purpose the provisions of the structure plan were for all intents and purposes totally irrelevant. In other words, for the purposes of issuing or giving written directions pursuant to s 21(3), matters like historical and architectural significance as well as preservation of buildings could not be the subject matter of 'written directions'. Compatibility with architecture, character or appearance of buildings located in the surrounding area of a new building could only be the subject matter of conditions imposed under s 22(5) (i) of the TCPA. Therefore, the said direction was ultra vires the TCPA (see pp 61G–62A).

[Bahasa Malaysia summary

Pihak pemohon merupakan pihak berkuasa tempatan yang diperbadankan menurut Akta Kerajaan Tempatan 1976 dan adalah pihak berkuasa untuk perbandaran Pulau Pinang. Pihak pemohon juga merupakan pihak berkuasa perancangan tempatan untuk Pulau Pinang menurut Akta Perancangan Bandar dan Negara 1976 ('APBN'). Penentang pertama dibentuk di bawah s 36 APBN untuk mendengar rayuan menurut s 23 APBN terhadap keputusan Pihak Berkuasa Tempatan yang dibuat di bawah s 22(3) APBN. Penentang kedua merupakan pihak pemaju. Penentang kedua mengemukakan satu permohonan untuk kebenaran perancangan untuk kemajuan. Pihak pemohon telah membuat satu arahan tertentu ('arahan tersebut') dan mengarah supaya penentang kedua meminda pelan dengan sewajarnya untuk mematuhi arahan tersebut oleh pihak pemohon dan untuk menyerah semula permohonan untuk pertimbangan. Walau bagaimanapun, penentang kedua memfailkan

notis rayuan terhadap arahan tersebut oleh pihak pemohon di bawah s 23 APBN. Penentang pertama telah mendengar rayuan tersebut. Pihak pemohon membangkitkan bantahan permulaan di pembicaraan berlandaskan alasan bahawa arahan tersebut bukanlah satu perkara yang boleh dirayu di bawah s 23 APBN. Selepas mendengar rayuan atas merit, penentang pertama membenarkan rayuan penentang kedua dan memutuskan bahawa pihak pemohon tidak berkuasa untuk mengeluarkan arahan tersebut. Pihak pemohon tidak puas hati dengan keputusan penentang pertama lalu memohon kajian semula kehakiman melalui certiorari untuk membatalkan keputusan penentang pertama.

Diputuskan, menolak permohonan tersebut:

(1) Keputusan yang dirujuk dalam s 23 APBN mestilah secara perlu dianggap termasuk apa-apa arahan atau keputusan yang dibuat oleh pihak pemohon berhubung dengan mana-mana perkara berkaitan permohonan untuk kebenaran perancangan yang dibuat menurut s 21(1) APBN. Disebabkan pertimbangan rangka perundangan perkataan-perkataan 'written directions' dalam s 21(3) mestilah juga dianggap sebagai bermaksud satu keputusan pihak berkuasa perancangan tempatan seperti diperuntukkan di bawah s 23(1). Arahan bertulis juga merupakan satu keputusan (lihat ms 56E–G).

(2) Masalah dalam kes ini adalah satu berkaitan *casus omissus*, iaitu suatu perkara yang seharusnya telah tetapi tidak diperuntukkan dalam kanun, daripada bermaksud sesuatu yang bersifat tepat dan amat jelas. APBN merupakan Akta yang memperkukuh serta komprehensif berkaitan dengan undang-undang perancangan di negara ini. Hakikat bahawa s 36 APBN mengandungi peruntukan untuk penubuhan satu Lembaga Rayuan adalah mencukupi untuk mencadangkan pihak terkilan yang terlibat dalam proses perancangan haruslah diberi hak rayuan. Sekiranya pendekatan literal diterimapakai maka dengan jelas ia boleh mengakibat dalam keadaan menindas dan tidak menentu di mana pihak berkuasa tempatan atas mana-mana daripada pelbagai alasan boleh mengenakan arahan bertulis yang tidak boleh diterima dan tidak wajar dan pihak pemohon yang terkilan tidak akan mempunyai sebarang remedi atau rayuan (lihat ms 57E–G).

(3) Pihak pemohon gagal menyedari bahawa s 22(2) APBN hanya terpakai untuk tujuan memberi secara mutlak atau tertakluk kepada syarat-syarat, atau untuk keengganan memberi kebenaran perancangan. Adalah tersirat bahawa untuk tujuan s 21(3) APBN, tiada keperluan untuk mengambil kira peruntukan pelan struktur dan dengan itu untuk tujuan terhad itu, peruntukan pelan struktur sebenarnya tidak relevan pada keseluruhannya. Dalam ertikata lain, untuk tujuan mengeluar atau memberi arahan bertulis menurut s 21(3), perkara seperti peri pentinganya

sejarah dan seni bina serta pengekalan bangunan tidak boleh membentuk perkara 'arahan bertulis'. Keadaan kebersesuaian dengan seni bina, sifat atau rupa bangunan-bangunan yang terletak di kawasan sekeliling bangunan baru hanya boleh membentuk perkara syarat-syarat yang dikenakan di bawah s 22(5)(i) APBN. Maka, arahan tersebut adalah ultra vires APBN (lihat ms 61G–62A).]

Notes

For cases on local authority, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 48–54.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)
Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)
Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513 (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam Samykano [1997] 1 MLJ 94 (refd)
Kumpulan Kamunting Sdn Bhd v Rajoo & Ors [1983] 2 MLJ 400 (refd)
Lucy v W T Henleys Telegraph Works Co Ltd [1969] 3 All ER 456 (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)
Magor & St Mellons Rural District Council v Newport Corporation [1950] 2 All ER 1226 (refd)
Maunsell v Olins & Anor [1975] 1 All ER 16 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Northam v London Borough of Barnet [1978] 1 All ER 1243 (refd)
Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (refd)
Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai Butterworth [1990] 2 MLJ 111 (refd)
Seaford Court Estates Ltd v Asher [1949] 2 All ER 155 (refd)
Syarikat Bekerjasama-sama Sungai Gelugor v Majlis Perbandaran Pulau Pinang [1996] 2 MLJ 697 (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42 (refd)

Legislation referred to

Town and Country Planning Act 1976 ss 21(3)(a), (b), (c), (d), (e), (f), (g), 22(2), (3), (5)(i), 23(1), 24(3)

Gurubachan (*L Andrew* with him) (*Andrew & Co*) for the applicant.
Mazni Buang (Deputy Public Prosecutor) for the first respondent.
Balasundaram (*Balasundaram*) for the second respondent.

Kamalanathan Ratnam J:

Facts

The applicant is a local authority incorporated pursuant to the Local Government Act 1976 and is the local authority for the island of Penang. The applicant is also the local planning authority for the island of Penang pursuant to the Town and Country Planning Act 1976 ('the TCPA') and the local authority pursuant to the Street, Drainage and Building Act 1974. The first respondent is constituted under s 36 of the TCPA to hear appeals pursuant to s 23 of the TCPA against decisions of the local planning authority made under s 22(3) of the TCPA. The second respondent is a developer.

On 30 December 1993, the second respondent made an application for planning permission for development, namely the demolition of the existing building known as No 457 Jalan Burma, Penang ('the said building') on Lot No 2334 Section 1, George Town, North East District, Penang ('the said land') and for the erection of a 20 storey terrace apartment thereon. The registered owner of the said land is the visitor in the Federation of Malaya of the Christian Brothers' Schools. The said land is zoned 'educational' in the applicant's Interim Zoning Plan No 1/1973. By a letter dated 26 April 1994, the applicant directed the second respondent to amend the documents/plans submitted together with its application, in accordance with the comments and recommendations of the relevant departments before its application could be further processed for a final decision by the applicant. This was done by virtue of the powers conferred upon the applicant by s 21(3)(g) of the TCPA. The second respondent was required to comply within three months failing which the application was deemed to have been withdrawn.

By a letter dated 21 March 1995 and after the expiry of the stipulated period of three months, the second respondent's architect returned to the applicant the amended layout plans for its further consideration and approval together with a fresh proposal for the demolition of the said house and for the erection of a 24 storey building consisting of a basement, a 60 unit apartment office, restaurant and car park.

The second respondent's application was then referred to the planning and building committee of the applicant which then referred the matter to the development and planning standing committee of the applicant for recommendation on conserving the said house and for the rezoning of the said land from 'educational' to 'commercial'. On 14 October 1996, the development and planning committee of the applicant made the following decision.

> (i) Permohonan perlingkungan semula dari 'pelajaran' kepada 'perdagangan' adalah diperakukan tetapi Bangunan No 457 Jalan Burma hendaklah dikekalkan. Pemaju boleh membina di tepi bangunan sedia ada. Walau bagaimanapun, sekiranya pemaju ingin merobohkan bangunan sedia ada, mereka perlu menunggu siapnya kajian bangunan-bangunan warisan di Pulau Pinang oleh Jawatankuasa Pemiliharaan di peringkat Negeri.

By a letter dated 18 November 1996, the applicant informed the second respondent of the said decision and reproduced the said directive and directed the second respondent to amend the plan accordingly in order to comply with the said decision of the applicant and to resubmit the plan within two months from the date of the said letter for its consideration. However, the second respondent filed a notice of appeal dated 17 December 1996 against the directive of the applicant contained in the letter dated 18 November 1996, under s 23 of the TCPA. The said appeal was heard on 27 September 1997 by the first respondent.

The applicant raised a preliminary objection at the hearing to the effect that the said direction given by the applicant to the second respondent that the said building be preserved and that the second respondent's proposed development be erected in the vicinity of the said building, was not an appealable matter under s 23 of the TCPA.

After hearing submissions on the preliminary issue, the appeal board ruled as follows:

> It is the unanimous decision that the preliminary objection has not been established. Any aggrieved party, aggrieved by whatever decision must be allowed to appeal. The statutory right of appeal cannot be rendered useless. It cannot be constructed to defeat the law. The only provision in the Act is s 23. To accept Mr Murgan's view is to deny the appellant a right of appeal.

After hearing the appeal on the merits, the first respondent allowed the second respondent's appeal and held that the applicant had no powers to issue the said directive.

Dissatisfied with the decision of the first respondent, the applicant sought judicial review by way of this writ of certiorari (encl 12) to quash the decision of the first respondent.

Findings of this court

Mr Gurbachan, for the applicant, took the same preliminary objection before me as his first issue. It is common ground that the directive given by the first respondent was given pursuant to s 21(3)(g) of the TCPA. It is therefore necessary to reproduce the entire s 21(3) of the TCPA which reads as follows:

> Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say:
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> (a) the level of the site of the building;
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> (b) the line of frontage with neighbouring buildings;
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> (c) the elevations of the building;
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> (d) the class, design, and appearance of the building;
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> (e) the setting back of the building to a building line;
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> (f) access to the land on which the building is to be erected; and
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> (g) any other matter that the local planning authority considers necessary for purposes of planning.

A The question is, is the directive given by the first respondent pursuant to s 21(3)(g) of the TCPA appealable. Before considering this question, it is necessary to reproduce the relevant section that deals with the manner in which an application of such a nature is dealt with by the applicant.

The relevant provisions of s 22 of the TCPA are reproduced:

B (1) As soon as possible after the receipt of an application for planning permission, or, if the application is one to which s 21(6) applies, as soon as possible after the expiry of the period within which objections may be made or, if objections have been made, as soon as possible after the objections have been dealt with under s 21(7), the local planning authority shall decide on the application for planning permission.

C (2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular:

(a) the provisions of the development plan, if any,
(b) the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those provision;
D (ba) the provisions of the Sewerage Services Act 1993;
(bb) the development proposal report; and
(c) the objections, if any, made under s 21.

(3) After taking into consideration the matters specified in sub-s (2), the local planning authority may, subject to sub-s (4), grant planning permission E either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

(4) The local planning authority shall not grant planning permission if:

(a) the development in respect of which the permission is applied for would contravene any provision of the development plan; or
F (b) the applicant for planning permission has neither paid the development charge payable in respect of the development nor obtained the permission of the local planning authority under s 34(1) to pay the development charge by instalments.

(5) xxx

G (5A)xxx

(6) If planning permission is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form and at the same time a notice of the grant thereof shall be given to any person who has made any objection pursuant to s 21(6).

H Section 23(1) of the TCPA which relates to appeals against the decision of local planning authorities reads as follows:

An appeal against the decision of the local planning authority made under s 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by:

I (a) an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and

(b) a person who has lodged an objection pursuant to s 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection. A

Since there is no dispute by the parties that the directive given by the applicant by its letter dated 18 November 1996 was in fact made pursuant to s 21(3)(g) of the TCPA, it is the case of the applicant that there is no provision for appeals against directions made pursuant to s 21(3) of the TCPA. To my mind, the procedure for appeal as set out in s 23 will surface when a decision is made pursuant to s 22(1) of the TCPA. Here the decision making stage had yet to be reached. What is the position if there is a dispute at the initial stages namely when the application for planning permission had been submitted and a party objects to written directions. The thrust of the applicant's argument on the first respondent's right to hear the appeal is predicated upon the argument that there was no 'decision' by the applicant in respect of the application for planning approval made by the second respondent. The applicant contends that its directions to the second respondent's architect, in particular Direction No 16 with regard to preserving the building, was not a decision appealable to the first respondent. In support of this, the applicant argued that an appealable decision must be conveyed to the aggrieved party in the prescribed forms provided under the Planning Control (General) Rules 1990 made under the TCPA. Thus, the applicant's case is that the decision that was made the subject of the appeal before the first respondent, was not a decision granting planning permission either absolutely or subject to conditions or a refusal to grant planning permission. The applicant argued that only a decision made under s 22(3) of the TCPA can be made the subject of an appeal under s 23 of the TCPA. B C D E

I take the view that the decision referred to in s 23 of the TCPA must of necessity be taken to include any direction or ruling made by the applicant in relation to any matter that concerns the application for planning permission made persuant to s 21(1) of the TCPA. I hold that the words 'written directions' in s 21(3) of the TCPA must by reason of legislative framework considerations be taken also to mean a decision of the local planning authority as provided under s 23(1) of the TCPA. A written direction is also a decision. F G

The applicant relied on *Syarikat Bekerjasama-sama Sungai Gelugor v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 for the proposition that a condition not made under s 22(3) read with s 24(5) of the TCPA was not an appealable matter under s 23 of the TCPA. With respect, this is not the proposition that emerges from that case. Mahadev Shankar JCA was discussing the second issue that formed the subject matter of the appeal in the context of the availability of an alternative remedy by way of an appeal as opposed to an application for judicial review. It is in that context that the learned judge said the words that are now claimed by the applicant as suggesting that there is no decision within the context of s 23 of the TCPA. Even when this case went up to the Federal Court, Edgar Joseph Jr in a lengthy and erudite judgment, dealt with the issue at hand namely whether the society's letter dated 10 August 1993 fell within the meaning of an H I

appeal under s 23 and read with s 24(3) of the TCPA. The Federal Court went further to hold that the decision of the council dated 20 September 1993 refusing review made pursuant to the letter dated 10 August 1993 was not an appealable decision under s 23 and read with s 24(3) of the TCPA. Section 21(3)(g) of the TCPA was not an issue (see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan* [1999] 3 MLJ 1). It must be remembered that a case is only authority for what it actually decides (see *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at p 766). I hasten to add that it is not my intention to breach the principle of stare decisis. In the circumstances, I hold that the question whether a written direction given under s 21(3) of the TCPA is appealable or not, is open for this court to decide, as I have not been shown any binding authority or precedent. In my view *Syarikat Bekerjasama-sama* is certainly not an authority for what the applicant suggests.

Purposive or literal construction (casus omissus)

It is the applicant's case that it was wrong for the first respondent to have adopted the 'purposive construction' in preference to the 'literal construction' in overruling the preliminary objection raised by the applicant at the hearing before the appeal board. The applicant relied on *Kumpulan Kamunting Sdn Bhd v Rajoo & Ors* [1983] 2 MLJ 400, and various other authorities to argue that where the meaning of the statutory words are plain or precise and are unambiguous, the purposive approach cannot be adopted.

It is my judgment that the problem in this case is one of *casus omissus* rather than one of being precise and unambiguous. It is regrettable that the TCPA has not provided for a situation where an applicant for planning permission is aggrieved by the imposition of a condition by way of written directions given pursuant to s 21(3) of the TCPA.

The TCPA is both a consolidating as well as a comprehensive Act in respect of planning law in this country. The fact that s 36 provides for the establishment of an appeal board is sufficient to suggest that aggrieved parties involved in the process of planning should be given the right of an appeal. If, as suggested by the applicant, the literal approach is to be adopted, then quite clearly it could result in an oppressive and capricious situation where a local planning authority for any one of several reasons could impose intolerable and improper written directions and an aggrieved applicant will not have any recourse to a remedy or an appeal. This situation is precisely what the appeal board referred to as an 'absurd result' and which the case of *Maunsell v Olins & Anor* [1975] 1 All ER 16 referred to as 'injustice, absurdity, anomaly or contradiction'.

The crux of the issue concerning the purposive approach or literal approach is one of *casus omissus* ie that a matter which should have been, but has not been provided for in a statute. In this regard, one has to bear in mind the words of Denning LJ in *Seaford Court Estates Ltd v Asher* [1949] 2 All ER 155 at p 164:

> ... when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature.
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> ... A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

Denning LJ restated the same view in his dissenting judgment in this way in *Magor & St Mellons Rural District Council v Newport Corporation* [1950] 2 All ER 1226 at p 1236:

> ... This was so obviously the intention of the minister's order that I have no patience with an ultra-legalistic interpretation which would deprive them of their rights altogether. I would repeat what I said in *Seaford Court Estates Ltd v Asher*. We do not sit here to pull the language of Parliament and of ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

In *Lucy v W T Henleys Telegraph Works Co Ltd* [1969] 3 All ER 456 at p 462, Denning LJ reaffirmed this:

> How should we construe an Act of Parliament? I have said before, and I repeat it now, that we should so construe an Act of Parliament as to effectuate the intention of the makers of it, and not to defeat it. If they have by mistake overlooked something, we should do our best to smooth it out. We should construe it so as to avoid absurdities and incongruities, and to produce a consistent and just result.

Finally in *Northam v London Borough of Barnet* [1978] 1 All ER 1243, Denning LJ delivered the final deathblow to the strict literal approach. Speaking of the Trade Union and Labour Relations Act 1974, he said at p 1246:

> Yet they thought the judges had their hands tied by the words of the Act. They said:
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> > '... Clearly someone has a duty to do something about this absurd and unjust situation. It may well be, however, that there is nothing we can do about it. We are bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or judicial tribunals.'
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> I have read that passage at large; because I wish to repudiate it. It sounds to me like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter.

> It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach, which Lord Diplock described as the 'purposive' approach. He said so in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 at p 893, [1971] AC 850 at p 881); and it was recommended by Sir David Renton and his colleagues in their valuable report entitled *'The preparation of Legislation'*. In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision'. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done had they had the situation in mind.

The purposive approach to legislative interpretation has been adopted by the Federal Court in *Krishnadas all Achutan Nair & Ors v Maniyam Samykano* [1997] 1 MLJ 94 and in *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42.

On merits

In *Bekerjasama-sama Serbaguna*, Mahadev Shankar JCA said in the Court of Appeal that an application on the merits is one which depends on the inherent justice of the appellants' contention. It turns on the substantial facts of the case as distinguished from technical objections or collateral matter. I therefore directed Mr Gurbachan to address me on the merits of his case.

Is direction 16, ultra-vires the TCPA?

The ejusdem generis point.

The appeal board concluded that the applicant had no powers under s 21(3) of the TCPA to impose the requirement that the existing building be preserved and that the second respondent's proposed development be erected in the vicinity of the said building. In doing so, the appeal board held that s 21(3) of the TCPA has to be read ejusdem generis to the specific matters enumerated in s 21(3)(a) to (f) of the TCPA. The appeal board was of the view that the directions given to the second respondent must relate only to the external appearance of the proposed building and not to the retention or preservation of an existing building.

The ejusdem generis point invariably relates to the construction of a statute and it is therefore relevant to see how the Malaysian courts have in the past treated this matter.

Where the words in a statute are plain and unambiguous they are to be given their plain, ordinary and common usage meaning (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273).

Peh Swee Chin FC, in *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513 said at p 551 as follows: A

> Whilst it is true that among the various rules of interpretation of statutes, it is an important rule that a statute should be construed as a whole for certain purposes and in fact the dissenting judgment seems to have been based on this but for finding and emphasizing the repeated use of the words of 'Malay subjects', etc. There are various other rules, such as the literal rule, the golden rule, the mischief rule (ie the purposive approach rule), ejusdem generis rule, *expressio unius est exclusio alterius* rule, etc. The dissenting judgment does not refer to any other rules or their actual application by omitting the names of such rules. B
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> However apart from the aforesaid rules in aid of interpretation of statutes, there are also a large number of general presumptions which may apply unless precluded expressly or by necessary implication and which appear to have been totally ignored in the dissenting judgment too. Such general presumptions are, eg presumptions against (a) interference with vested rights; (b) a legislature not having a parliamentary or legislative intention for justice and common sense; (c) a legislature not knowing the existing state of the law and the decided cases on words interpreted by courts at the time of bringing in new legislation; (d) inconsistency in not interpreting similar language in statutes in pari materia, etc. There are the rules, and there are also the presumptions, all together involved in the interpretation of statutes, and for that matter in the interpretation of documents other than statutes. C D
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> It is in my view that not just a single rule of interpretation should be contemplated, pursued and employed in interpreting any statute to the exclusion of all others; one should test the said single rule with other rules and general presumptions wherever appropriate. E
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> It is my further view that by far the most important rule for interpreting a statute, or section or words therein, is the purposive approach rule, which will in practice resolve most if not all of the difficulties one faces. F

I hold that whether condition 16 is ultra vires or intravires the TCPA falls to be decided by reference to the following proposition of law, which in my view is incontrovertible. The extract, paraphrased as appropriate, is taken from the decision of Gopal Sri Ram JCA in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17 where he held that the applicant being a local authority is a public decision maker upon whom a power or discretion is vested by Parliament under the provisions of the TCPA. The MPPP is therefore akin to a trustee. The MPPP is under an obligation to exercise its power and discretion reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. It matters not a jot to the principle that the language employed in the conferment of the power or discretion is of wide amplitude. This much was made clear by the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, considered by all concerned to be the leading case upon the subject. G H

Coming to the case before me, it is my judgment that the appeal board was not wrong when it said that the specific matters enumerated in s 21(3)(a) to (f) of the TCPA possess a common and dominant feature in that they all relate to the external character of a proposed building. The I

A appeal board was, it must be remembered, dealing with 'the intention of the legislature as gathered from the entire section' and that general words are to be read as a continuation of the preceding specific matters in s 21(3)(a)–(f). Taken in that context, it is obvious that the genus identified by the appeal board relates to the 'erection of a building' and the 'written directions' relate to that building and not the retention or preservation of an existing building. B Seen in the perspective herein stated, the appeal board's identification of 'the external character' of a proposed building as the genus inherent in (a)–(f) of s 21 of the TCPA is not at all inaccurate or a wrong conclusion.

The case of *Rethina Development Sdn Bhd v Majlis Perbandaran Seberang Perai Butterworth* [1990] 2 MLJ 111 was relied on by the applicant as C authority for the proposition that any direction to a developer for carrying out landscaping and planting of trees in a housing scheme does come within the meaning of 'any other matter' that the local planning authority considers necessary for purposes of planning of s 21(3)(g) of the TCPA, thus giving it a wide interpretation and forestalling the application of the 'ejusdem generis' rule.

D With respect, the applicant has in my view, misunderstood the import of *Rethina Development*. It is certainly not an authority for the narrow principle propounded by the applicant. The judge in *Rethina* was dealing with conditions imposed by the local authority when granting planning permission under s 22(3) of the TCPA and an undertaking given by the E developer at the time of approval of planning permission.

In the case before me, planning permission has not yet been granted and the written direction concerning the retention and preservation of the existing building was made under s 21(3) of the TCPA, at the stage when the application for planning approval was made.

F The applicant argued that the structure plan permits the local authority to identify areas and buildings of historical, cultural and architectural significance or with other attractive and pleasant features worth preserving and to take appropriate steps to conserve or preserve these areas and buildings in the planning and growth. Section 22(2) of the TCPA, it is said, refers to the matters that a local authority shall take into consideration for G proper planning, and the provisions of the development or structure plan is one of them.

In my view, by the same token, it must be said that the applicant has failed to recognize that s 22(2) of the TCPA is only applicable for the purposes of granting either absolutely or subject to conditions, or for refusal H to grant planning permission. It is implicit that for the purposes of s 21(3) of the TCPA there is no such requirement to take into account the provisions of the structure plan and therefore for that limited purpose, the provisions of the structure plan are for all intents and purposes totally irrelevant. In other words, for the purposes of issuing or giving written directions pursuant to s 21(3) of the TCPA, matters like historical and I architectural significance as well as preservation of buildings cannot be the subject matter of 'written directions'. Compatibility with architecture, character or appearance of buildings located in the surrounding area of a

new building can only be the subject matter of conditions imposed under s 22(5)(i) of the TCPA. Therefore, direction 16 is ultra vires the TCPA. I therefore dismissed encl 12 with costs. A

Application dismissed.

Reported by Zahid Taib B

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